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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1040

JAMES ALVIN BAXTER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

JOHN F. DUGGER,
Bank of Commerce Building,
Morristown, Tennessee,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

I.

James Alvin Baxter prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which was entered in the above case on March 10, 1965.

II.

OPINION BELOW.

The United States Court of Appeals for the Sixth Circuit rendered and filed its per curiam opinion on March 10, 1965, not yet reported, a copy of which is printed as an appendix to this petition.

III.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 10, 1965. The jurisdiction of this court is invoked under Title 28, Sec. 1254.1 U. S. C.

IV.

QUESTIONS PRESENTED.

No. 1: Should a conviction stand where the evidence was obtained by Government informers employed, without justification, on a contingent fee basis of $10.00 per day subsistence and the promise of a reward at the conclusion of the investigation?

No. 2: Is a defendant entitled to attack a search warrant on the ground that the averments in the affidavit on which the search warrant was issued were false?

No. 3: Is a defendant entitled to subpoena the United States Attorney to produce for use at the trial the Government fingerprint records and other records showing convictions of Government informers and Government records showing payments to said Government informers?

V.

CONSTITUTIONAL PROVISIONS INVOLVED.

The relevant provisions of the Constitution of the United States are set forth in the appendix, infra, page 8.

VI.

STATEMENT.

Petitioner was indicted in a four count indictment relating to the sale and possession of nontaxpaid whiskey on January 7, January 11, January 18, and April 7, 1963, in violation of Secs. 5205 (a) (2) and 5604 (a) (1), Title 26, U. S. C.

The jury was unable to agree as to Counts 1 and 2 relating to incidents on January 7 and January 11, 1963, and these counts were subsequently dismissed. The petitioner was convicted on Counts 3 and 4 and was sentenced to serve eighteen months on each count, said sentences to run consecutively.

The proof disclosed that in the latter part of 1962, the government employed two informers to do undercover work in Cocke County, Tennessee. Bobby Moore, one of the informers, was from Greeneville, Tennessee, and was first contacted by an ATU agent while in custody of the Greeneville, Tennessee, Police Department on a charge of transporting nontaxpaid whiskey. Leroy Stone, the other informer, was from Upton, Kentucky, and came to East Tennessee to work for the government after being contacted by a Kentucky agent. He testified that he had worked for the government off and on for about eight years as an informer.

Both informers were employed on a contingent fee basis, i. e., they were paid subsistence at the rate of $10.00 per

day and a reward at the end of the investigation. The records of the government showing the amount of reward and other money paid to the informers were subpoenaed by the defendant for inspection prior to trial and use at the trial but were not produced and the Court refused to delay the trial until the defendant could have such records available. John L. Laughorn, ATU Agent, testified that he believed Bobby Moore was paid $150.00 reward and that Leroy Stone was paid $150.00 reward by the Greeneville office of the ATU. He did not know how much reward the Knoxville office of the ATU paid Stone. Moore did not remember how much he was paid. Stone testified that he received $150.00 reward from the Greeneville office and about $300.00 from the Knoxville office. Stone worked in Cocke County out of both the Greeneville and Knoxville office of the ATU.

The government officers advised the informers who they wanted caught and the defendant-appellant's name was on the list furnished.

The defendant also subpoenaed the government to produce for inspection prior to trial and use at the trial, the criminal record of both informers which was also not produced and the Court forced the defendant to trial without such records.

Bobby Moore testified that he and Leroy Stone went to the home of the defendant, Baxter, on the night of January 7, 1963, and that he told Baxter that Stone had been a friend for three or four years, that Stone lived with him and that they were in the whiskey business together in Greeneville. That he was hard up for money and needed whiskey bad. Stone denied this testimony.

Moore and Stone testified that on the night of January 7th, they went to Baxter's house and purchased one case and one gallon of nontaxpaid whiskey. That on January 11, 1963, they again went to Baxter's residence and pur-

chased four cases of nontaxpaid whiskey. That on January 18, 1963, they went back to Baxter's residence and purchased five cases of nontaxpaid whiskey. That on each occasion they transported the whiskey back to Greeneville and turned it over to Investigator Laughorn. Moore testified that they paid Baxter more than the going rate for whiskey and that he told Baxter that he was hard up and needed whiskey bad.

Moore further testified that on April 2, 1963, he took Investigator Belvin to Baxter's house and that they carried a case of nontaxpaid whiskey with them. That they went to his house two or three times and finally located him at a drive-in restaurant across the road from his residence. That he told Baxter he had been hauling whiskey for Belvin and that Belvin lived in Greeneville and his name was Lawrence Britton. Moore further testified that the defendant, Baxter, told them that he did not have any whiskey.

Investigator Belvin executed an affidavit on April 5, 1963, before a United States Commissioner in order to procure a search warrant and in said affidavit he swore that Baxter told him on April 2, 1963, that he had thirty-six gallons of nontaxpaid whiskey in his house. The United States Commissioner issued a search warrant based on this affidavit and another affidavit executed by Stone relating to his activities in January. The search warrant was executed on April 7, 1963, and 124 gallons of nontaxpaid whiskey was found. The execution of this search warrant is the basis of the fourth count of the indictment.

The defendant, prior to trial, filed a motion to suppress the evidence obtained by the informers on the ground that they were employed on a contingent fee basis and to suppress the evidence obtained in the execution of the search warrant on April 7th, on the ground that the material averments in the affidavit for issuance of the search

warrant were false. This motion was overruled by the District Court and the District Court refused to decide whether or not the averments contained in the affidavit were false stating that he could not go behind the affidavit.

VII.

REASONS FOR GRANTING WRIT.

The evidence was procured by and as the result of the activities of two Government informers who were employed on a contingent fee basis without justification. Informers employed under such an arrangement might tend to frame or persuade innocent persons to commit crimes in order to obtain a larger fee. The Fifth Circuit in Williamson v. U. S., C. A. 5, 1962, 311 F. 2d 441, held that a conviction based on such evidence could not stand. Petitioner contends this Court should use its supervisory powers and prohibit employment of informers on such basis. McNabb v. U. S., 318 U. S. 332; Olmstead v. U. S., 277 U. S. 438, 485, 72 L. Ed. 944, 959, 48 S. Ct. 564.

The only averments in the affidavits for the search warrant which were timely and sufficient to establish probable cause was the statement by Bobby R. Belvin that petitioner told him on April 2, 1963, that he had thirty-six gallons of nontaxpaid whiskey in his house. The informer, Bobby Moore, was present during the entire conversation and he testified that petitioner told them that he did not have any whiskey. Petitioner contended that the statement of Belvin was false and that the search warrant was therefore void. The District Court held that he could not go behind the face of the affidavit. This Court has not heretofore decided whether or not false testimony in an affidavit for a search warrant voids the warrant. Rugendorf v. U. S., 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825. This Court held in Mesarosh v. U. S., 352 U. S. 1, 1 L. Ed. 2d 1, 77 S. Ct. 1, that the dignity of the United

States Government will not permit the conviction of any person on tainted testimony. Certainly, the Government should not be permitted to obtain a search warrant on tainted testimony and thus indirectly obtain a conviction on tainted testimony.

The petitioner had a subpoena duces tecum issued and directed to the United States Attorney or Assistant United States Attorney requiring him to produce for inspection prior to trial on the morning of the trial and for use at the trial the records of the Government showing all payments to the informers and the fingerprint and other Government records showing conviction of the two Government informers. The Government made no attempt to produce these records and the District Court refused to delay the trial until same could be produced. These records were the only means available to petitioner to determine whether or not the informers were telling the truth as to their prior criminal records and as to the money paid to them by the Government and could conceivably have destroyed their credibility as witnesses. Fisher v. U. S., 231 F. 2d 99.

VIII.

CONCLUSION.

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

JOHN F. DUGGER,
Bank of Commerce Building,
Morristown, Tennessee,
Attorney for Petitioner.

APPENDIX A.

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

APPENDIX B.

No. 15,883.

United States Court of Appeals
For the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. James Alvin Baxter, Defendant-Appellant.	On Appeal from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided March 10, 1965.

Before Weick, Chief Judge, and Cecil and Edwards, Circuit Judges.

Per Curiam. James Alvin Baxter, defendant-appellant herein, appeals from a conviction in the United States District Court for the Eastern District of Tennessee, Northeastern Division, on counts three and four of a four-count indictment. The jury disagreed on counts one and two and they were subsequently dismissed. The third count charged possession and sale of non-taxpaid whiskey on January 18, 1963, and the fourth count charged possession of non-taxpaid whiskey on April 7, 1963.

One of the assignments of error is that the trial judge erred in overruling the defendant's motion to suppress the evidence. The basis of this claim is that government agent Belvin, in the affidavit for a search warrant, acted on information of two informers who were paid contingent fees, and that Belvin's statement in the affidavit, that the de-

fendant told him on April 2, 1963, that he had thirty-six gallons of whiskey in his house, was false.

The government did employ and place reliance on two informers, Moore and Stone, who were paid ten dollars a day for subsistence, with a promise for further payment at the end of the investigation which was unfortunately and probably mistakenly characterized as a reward. Moore and Stone were each paid $150 at the end of the investigation. These payments were made prior to trial and not based on convictions. The facts here are distinguishable from **Williamson v. United States**, 311 F. 2d 441, C. A. 5. There the informer was to be paid $200 for "catching" Big Boy, $200 for James McBride and $100 for Hogie, Big Boy's half brother.

It is alleged in the brief of defendant that the defendant contended that he did not tell Belvin on April 2nd that he had any whiskey in his house. We find no testimony of the defendant in the record denying the statement of agent Belvin. Mr. Belvin testified on the motion to suppress and on the trial that the defendant said he had six cases of whiskey in his house. Although informer Moore, who was with Belvin on April 2nd when they talked to the defendant at a drive-in restaurant, testified that the defendant said he did not have any whiskey, this is not a direct contradiction of Belvin's testimony.

The method of paying the informers might raise questions as to their credibility and the weight to be given to their testimony but it would not invalidate the testimony. The fruits of the search upon execution of the search warrant on April 7th revealed 124 gallons of non-taxpaid whiskey in possession of the defendant.

The trial judge committed no error in denying the motion to suppress the evidence.

There is no merit to the assignment of error that the trial judge erred in not charging the jury on entrapment.

The informers did no more than afford opportunities for the commission of the offenses. They did not implant in the mind of the defendant a disposition to commit the offenses charged in the first three counts of the indictment. See **Sherman v. United States**, 356 U. S. 369. "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U. S. at 372. There was no evidence of entrapment in the case at bar to go to the jury.

Neither is there merit to the charge that the trial judge erred in requiring counsel for the defendant to go to trial without records subpoenaed from the government through the United States Attorney. The subject of the amount of money paid to the informers was fully explored at the trial and on the motion to suppress evidence. Informer Moore testified to one former conviction and informer Stone testified to no prior convictions. The only purpose of such evidence is to impeach the testimony of the witnesses. We think there was ample evidence to support the convictions on the third and fourth counts of the indictment, particularly the fourth one. Government counsel stated that the records in question were not in his file and so far as he knew they were not in his custody.

We are of the opinion that the instructions of the trial judge with reference to scrutinizing the testimony of informers were adequate and that they meet the requirements of the law.

We find no prejudicial error by reason of any limitation of cross-examination of government witnesses.

The judgment of the District Court is affirmed.

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1040

JAMES ALVIN BAXTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 9-11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1965. The petition for a writ of certiorari was filed on April 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for sale and possession of nontaxpaid whiskey was improper by reason of payment to informants of daily subsistence and the promise of an indefinite reward upon conclusion of their investigation.

2. Whether a search warrant was invalid because of the alleged falsity of a statement in one of the affidavits upon which it was based.

3. Whether the court properly denied a continuance because of the non-production of records as to payments of fees to, and convictions of, informers when the court knew that the informers were going to take the stand.

STATEMENT

Petitioner was charged in an indictment returned in the United States District Court for the Eastern District of Tennessee in counts 1, 2 and 3 with possession and sale of nontaxpaid whiskey, and in count 4 with possession of such whiskey, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1) (R. 4a-5a). The jury found him guilty on counts 3 and 4, but could not agree on counts 1 and 2, as to which the court declared a mistrial (R. 103a-106a). Petitioner was sentenced to imprisonment for 18 months on each of counts 3 and 4 to run consecutively (R. 15a). On appeal (R. 16a) the conviction was affirmed.

1. Petitioner filed a pre-trial motion to suppress evidence, the substance of which was that government

agent Belvin acted on the information of informants Moore and Stone, who were paid contingent fees, and that Belvin's statement, in his affidavit for a search warrant, that petitioner told him he had 36 gallons of whiskey in his house was false (R. 10a-12a, 8a-9a). After a hearing, the court overruled the motion to suppress (R. 17a-37a, 2a).

2. On January 13, 1964, a subpoena had been served upon an Assistant United States Attorney at Knoxville, Tennessee, for the pre-trial production, on January 16, 1964, of fingerprint and other United States records relating to the arrest and conviction of informants Stone and Moore, and records showing the government money paid for their work as informants during the period in question (R. 13a-14a). When the trial was ready to start, it appeared that no return under the subpoena had been made. Petitioner's counsel complained that he needed the records before he could proceed. The government attorney explained that the records were "not in the file, and, so far as I know, not in our custody" (R. 38a-40a). The court suggested that insofar as the amounts of money paid for undercover work were concerned, the subpoena should have been directed to the Alcohol-Tobacco Tax Division (R. 42a). It said (R. 42a-43a):

> THE COURT: Well, of course, there's no indication here that the subpoena duces tecum has been served, and the Court is not going to delay the trial solely on the grounds that testimony [is] to be used for impeachment purposes, when the witnesses themselves are present in court and

> will be offered, as the Court understands it, on direct examination by the prosecution, and can be cross-examined on that point, and every witness is presumed to speak the truth. And insofar as the amounts of money paid for undercover work in the case, the representatives of the Alcohol-Tobacco Tax Division are here, as well as the undercover agents themselves. So, if you are otherwise ready, then, on that point, the Court will order the trial to continue.
>
> MR. DUGGER: All right, your Honor.

3. Pertinent evidence at the hearing on the motion to suppress and at the trial may be summarized as follows:

In December 1962, government agents hired Moore and Stone as informants to make purchases of moonshine whiskey. They were paid $10 per day for subsistence, with a promise of an indefinite reward at the end of the investigation. They were told to get in touch with anyone who could sell a large quantity of whiskey. The agent asked them which sellers they knew and instructed them to establish contact with some of these sellers, including petitioner (R. 20a-21a, 43a-44a, 55a, 63a-64a). A reward of $150 was paid to each informant after petitioner's arrest on April 7, 1963 (R. 19a-20a, 28a-30a, 32a, 43a-46a, 52a-53a, 66a). Agent Lawhorn and Moore both testified that, when they first met, Moore was in jail at Greenville, Tennessee on a State charge for t ansporting nontaxpaid whiskey for which he was later convicted (R. 45a, 50a-51a). Stone testified that he had never been convicted of a felony, and that he had never been

convicted in the United States District Court of Kentucky for violating internal revenue laws relating to whiskey (R. 64a, 65a).

On January 7 (R. 47a-48a, 58a-60a), January 11 (R. 25a, 48a, 60a-61a), and January 18, 1963 (Count 3) (R. 25a, 49a, 62a, 78a-80a) Moore and Stone purchased quantities of nontaxpaid whiskey from petitioner and turned it over to government agents.

On April 2, 1963, agent Belvin and Moore went to a drive-in restaurant near petitioner's home. After Belvin told petitioner that his name was Lawrence Britton, petitioner took the number of his truck, told him to return the following Wednesday, and said that if he checked out all right petitioner would sell him whiskey (R. 34a-36a, 74a-75a). Belvin testified that on this occasion petitioner said he had six cases of whiskey at his house (R. 36a, 74a, 75a). Moore testified that on this occasion, when he and Belvin tried to buy some whiskey, petitioner stated that he did not have any at the time (R. 25a, 50a, 57a).

On April 7, 1963, petitioner was arrested and his residence was searched pursuant to a search warrant issued upon affidavits by informant Stone and agent Belvin (R. 72a-73a, 81a, 6a-9a). Government agents seized 124 gallons of nontaxpaid whiskey, which was the basis for the conviction under Count 4 (R. 73a, 82a).

ARGUMENT

1. Petitioner's conviction was not improper because the government informants were paid $10 per day

subsistence and were promised an indefinite reward upon conclusion of their investigation. The Secretary of the Treasury is specifically authorized by statute (26 U.S.C. 7623) to pay expenses for the detection and punishment of frauds (See also regulation, 26 C.F.R. § 301.7623-1.) The fact that the informants were paid went to the weight of their testimony, not to its admissibility. The jury was aware of the payments, which they could take into consideration under the court's general charge as to credibility of the witnesses and the admonition that the "self interest" of a witness prompting testimony unfavorable to an accused should be considered with caution and great care (R. 88a-89a).

The instant case is distinguishable from *Williamson* v. *United States*, 311 F. 2d 441 (C.A. 5). The reward promised was an indefinite amount; it was paid upon conclusion of the investigation, prior to trial, and was not contingent upon conviction. In *Williamson*, the payments were for the definite amounts of $200 for "catching" particular defendants. It is a reasonable assumption that an informant will be more diligent, and perhaps unscrupulous, in trying to make a case against an accused when the informer knows that conviction is necessary before he can be paid an amount specified in advance, than where he has merely been given a promise of an indefinite payment upon conclusion of his investigation.

2. The search warrant was not invalid because of an allegedly false statement by agent Belvin in his

affidavit to the effect that petitioner told him on April 2, 1963 that he had 36 gallons of nontaxpaid whiskey in his house (R. 9a). That statement was consistent with Belvin's testimony at the hearing on the motion to suppress and at the trial (R. 36a, 74a, 75a) and was not directly contradicted by Moore's testimony, as petitioner contends. Moore testified that when he and Belvin attempted to buy whiskey from petitioner, the latter said that he did not have any (R. 50a). But that may have meant simply that petitioner would make no sale (even though he may have had whiskey at his house as he told Belvin) until after he had checked on Belvin, who was told to return at a later date. Moreover, in addition to Belvin's affidavit, the government also submitted an affidavit by informant Stone, who stated that he had made purchases from petitioner in January (R. 6a-7a). The warrant was thus amply supported. See *United States* v. *Ventresca*, 380 U.S. 102; *Rugendorf* v. *United States*, 376 U.S. 528.

3. The court, in the proper exercise of its discretion (Cf. *Nilva* v. *United States*, 352 U.S. 385, 395; *Hardy* v. *United States*, 186 U.S. 224, 227), denied a continuance despite the non-production by the United States Attorney of records as to the informants' prior convictions and the amounts paid for their undercover work. The government attorney admittedly did not have custody of the records and petitioner had given the United States Attorney a very short period within which to obtain the information from other agencies. Since the sole purpose of the records was to impeach testimony and the witnesses on the sub-

jects were present and available for cross-examination, the court properly allowed the trial to proceed. The uncontradicted testimony of agent Lawhorn and informants Moore and Stone was that the latter were paid $10 per day for subsistence and a reward of $150 at the end of the investigation.[1] Moore admitted one former conviction and Stone denied any prior conviction for a felony. Significantly, even now there is no contention that any of this evidence as to payments and prior convictions is incorrect.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1965

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[1] Here there was no erroneous exclusion of evidence as to receipts of payments by informers, as in *Fisher* v. *United States*, 231 F. 2d 99, 104 (C.A. 9).

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